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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG and JOSEPH SOBEL,
Petitioners,

v.

UNITED STATES OF AMERICA.

**PETITION FOR REHEARING
OF PETITION FOR A WRIT OF CERTIORARI**

NATHAN L. MILLER,
J. BERTRAM WEGMAN,
Attorneys for Petitioners.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come Henry Lustig, E. Allan Lustig and Joseph Sobel, the petitioners above named, and pray that this Court may reconsider the denial of a writ of certiorari herein.

Your petitioners fear that two grave questions of the utmost public importance escaped the notice of the Court because counsel did not present them with sufficient clarity and conciseness.

Those questions are:

1. *Whether the United States Treasury Department has the power without agreement in writing to grant immunity from criminal prosecution to delinquent taxpayers who make voluntary disclosure before investigation, which power it has heretofore uninterruptedly exercised without question or challenge for more than twenty years.*

In the opinion below, the Circuit Court of Appeals squarely decided that the Treasury Department had no power to grant such immunity except by the execution of a formal written agreement of compromise, and that since there was no written agreement in the case at bar "there is no merit in the defense of immunity" (R. 2199-2200).

The District Court had on this ground withdrawn from the consideration of the jury the disputed question of fact whether the petitioners had made a voluntary disclosure before investigation in reliance upon an unequivocal promise of immunity (R. 1864-1869); and had submitted to the jury as the sole issue in the case the undisputed question whether false tax returns had been filed with intent to defraud the revenue.

After the trial the District Court decided that disputed question of fact, on a reserved motion, and the Circuit Court of Appeals accepted the Trial Court's findings of fact as depending "upon conflicting testimony or inferences therefrom" (R. 2200-2201).

Neither of the Courts below held or even suggested that the disputed question was not a question of fact, and in its answer to the petition for a writ of certiorari the Government attacked the credibility of witnesses. The Government has never claimed that disputes of fact on which a claim of immunity from criminal prosecution depends are not questions for the jury. Here the jury was expressly forbidden to consider those questions.

2. Whether on the constitutional questions of due process and self-incrimination, arising under the Fifth Amendment, there should ultimately have been submitted to the jury the disputed question of fact whether the petitioners' confession was induced by the Treasury Department's promise of immunity.

The record discloses that the Circuit Court of Appeals squarely decided that that question was "one of admissibility of evidence" to be finally decided by the Court (R.

2198) and that what this Court said in *Wilson v. United States* (162 U. S. 613, 624) was *dictum* (R. 2198).

The first question stated above has never been decided by this Court.

If the many observations of this Court indicating that the second question was a question for the jury were *dicta*, or apply only to trials in State Courts, the second question has never authoritatively been decided by this Court. The decision below on this question conflicts with the decisions of other Circuit Courts of Appeals, which have held that if there is a conflict of evidence whether a confession is involuntary, that question should ultimately be submitted to a jury under proper instructions by the Court. Thus there is uncertainty upon a vital and important principle of constitutional law.

WHEREFORE, your petitioners most humbly and respectfully pray this Court to reconsider the denial of a writ of certiorari herein and to grant them a hearing on the merits of those two questions.

The undersigned counsel for the petitioners certify that this petition for rehearing is presented in good faith and in the sincere belief that it has merit; and that it is not presented for the purpose of delay.

Respectfully submitted,

HENRY LUSTIG, E. ALLAN LUSTIG and
JOSEPH SOBEL,

Petitioners,

by

NATHAN L. MILLER,

J. BERTRAM WEGMAN,

Attorneys for Petitioners.